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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1728

STANLEY KOWALIK,

Petitioner,

v.

GENERAL MARINE TRANSPORT CORP. and
the Vessel "SAM BERMAN",

Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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Statement of the Case

In this case the complaint was dismissed below upon respondents' motion for summary judgment because it failed to state a claim upon which relief could be granted. The District Court, by the Hon. Marvin E. Frankel, held that petitioner, a seaman claiming wages due under a collective bargaining agreement containing mandatory griev-

ance procedures, was required to process his claim under the grievance procedures of that agreement. *Kowalik v. General Marine Transport Corp.*, 411 F. Supp 1325 (S.D. N.Y. 1976). The failure either to process the claim under the grievance procedures or to allege breach by petitioner's union of its duty of fair representation meant that the complaint did not state a cause of action under established principles of labor law. 411 F. Supp. at 1328.

The Court of Appeals affirmed the judgment below. It held in *Kowalik v. General Marine Transport Corp.*, 550 F. 2d 770 (2d Cir. 1977), that petitioner had not established a claim upon which relief could be granted because he failed to use the grievance procedures of the collective bargaining agreement. 550 F. 2d at 772.

Petitioner's complaint claims overtime wages allegedly due for the past six years under the terms of a collective bargaining agreement between petitioner's union and respondent corporation. The agreement upon which his claim is based contains grievance and arbitration procedures applicable broadly to any grievance or dispute involving the interpretation or application of the terms of the agreement or its breach. Petitioner concedes that these grievance procedures are applicable to his claim and further admits that he made no effort to use them. 550 F. 2d at 771.

Argument

It is basic that an employee may not sue his employer for breach of contract unless grievance remedies in an applicable collective bargaining agreement have been exhausted, or resort to such remedies is futile because the union is unfaithful to its duties of representation. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171, 183-187 (1967). The proper remedy for failure to exhaust grievance remedies is summary judgment dismissing the complaint. *Republic Steel Corp. v. Maddox*, *supra*; *Hubicki v. ACF Industries, Inc.*, 484 F. 2d 519 (3d Cir. 1973). In order to distinguish his case from the applicable principle, petitioner poses questions and arguments which misstate the reasoning and holding of *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971), and confuses the jurisdiction of a federal court with the merits of the wage claim itself.

In *Arguelles*, this Court clearly stated that its holding was a limited one, based upon the existence of the express statutory remedy for seamen created by 46 U.S.C. §596. Justice Douglas, writing for the majority, distinguished *Arguelles* from *Republic Steel Corp. v. Maddox*, *supra*, the case establishing that the use of grievance procedures is required, stating:

"In *Maddox*, there was no express exception governing individual claims of employees from §301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by §596. The reluctance in *Maddox* to redesign the statutory regime of §301 makes us equally

reluctant to redesign the statutory regime of §596." 400 U.S. at 357.

Justice Harlan's concurring opinion further stressed the distinction between a suit on the contract and emphasized that the decision involved the enforcement of a specific statute. 400 U.S. 361-62 (Harlan, J., concurring).

Courts of Appeals faced with the question have held that the exception *Arguelles* makes in the requirements of *Maddox* is based upon the existence of an alternate statutory remedy. They have rejected the argument now made by petitioner to this Court that a broad exemption exists for seamen from federal labor law requiring the use of contract grievance procedures. *Suissa v. American Export Lines, Inc.*, 507 F. 2d 1343, 1346-47 (2d Cir. 1974); *Cady v. Twin Rivers Towing Company*, 486 F. 2d 1335, 1338 (3d Cir. 1973) ("We are unable to discern in *Arguelles* any indication that the Court intended to create for seamen a broad exception to the principle of *Maddox*, when, as here, no alternate statutory remedy is available.")

Petitioner makes no claim that his cause of action is grounded in any alternate statutory remedy to the grievance procedures required by the collective bargaining agreement. Moreover, both the Court of Appeals and the District Court held that 46 U.S.C. §596, the statute interpreted by this Court in the *Arguelles* case, did not apply to petitioner and the petition does not seek review of that judgment. Therefore, the petition does not raise any question of a conflict with the rule in *Arguelles*.

The opinions in *Arguelles* further emphasize that the decision below is correct. Although the Court was divided

in *Arguelles*, all Justices agreed that, except for the specific statute upon which the seaman in that case based his claim, resort to grievance procedures prior to initiation of a law-suit was necessary for a seaman to state a cause of action. Thus, under the rule in *Maddox*, claims for breaches of collective bargaining agreements—by seamen or any other category of employee—must be processed under the grievance procedures of those agreements.

Petitioner's other argument that a conflict exists between the judgments below and the law regarding maritime liens is misplaced. The action was initiated *in rem* by the arrest of the vessel "Sam Berman" and the bond posted to release the vessel was returned after summary judgment was granted and the complaint dismissed. Petitioner thus obtained both access to federal court and a maritime lien to secure his claim until a decision was made on the merits. There is no basis for the assertion that the judgment deprives a seaman of access to federal courts or a right to a maritime lien.

The cases and statutes cited by petitioner regarding maritime liens relate to whether an action can be brought *in rem* and are irrelevant to a decision on the merits such as the judgment below. Petitioner confuses the jurisdiction of a court with the merits of his claim. The fact that a federal court has jurisdiction over an *in rem* action by a seaman for wages does not mean that such an action can be maintained after it has been dismissed for failure to state a claim upon which relief can be granted.

As the court below states, whether a claim will someday come to exist is now speculative and depends upon pe-

tioner and his labor union taking steps to exhaust contract grievance procedures. Absent any facts or allegations to establish an existing case or controversy, the complaint was necessarily dismissed. No important question of federal law is presented thereby.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JARED STAMELL
Attorney for Respondents

July 6, 1977